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Nos. 06-7949 & 06-6330

IN THE

Supreme Court of the United States

BRIAN MICHAEL GALL,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit

DERRICK KIMBROUGH,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For The Fourth Circuit

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), and *Rita v. United States*, 551 U.S. __ (2007), for an appellate court to require that a sentence which lies outside the Guidelines range be justified by "extraordinary circumstances"?

2. May judges consider whether the Guideline ranges applicable to a given category of offenses fail to represent a sound balancing of all the factors pertinent to selecting the sentence for a particular case or group of cases within that category?

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in fifty states, including private attorneys, public defenders, and law professors. The NACDL seeks to promote the proper administration of justice and to ensure that criminal sentencing comports with our Constitution. NACDL's intense concern for protecting fundamental Fifth and Sixth Amendment rights has led it to appear frequently as *amicus curiae* in this Court, including in *Rita v. United States*, 551 U.S. __ (2007), *United States v. Booker*, 543 U.S. 220 (2005), *Blakely v. Washington*, 542 U.S. 296, 312 (2004) (noting NACDL's position), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *United States v. Booker*, 543 U.S. 220 (2005), this Court excised the provision of the Sentencing Reform Act requiring judges to sentence within the Guidelines range "[i]n most cases," *id.* at 234, because the Sixth Amendment prohibits a sentence "outside the range authorized by the jury verdict," *id.* at 240. After *Booker*, the district court must choose a sentence based on the factors listed in 18 U.S.C. § 3553(a)—including its requirement, found in subsection (a)(4), that the court consult the applicable Guidelines range—and the court of appeals reviews that sentencing decision for reasonableness. Nonetheless, after *Booker*, the Guidelines have continued, in practice, to exert much the same force as before. The Department of Justice requires

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties have consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

prosecutors to "actively seek sentences within the range established by the Sentencing Guidelines *in all but extraordinary cases*."[2]

Of particular significance in the two cases now before the Court, some courts of appeals, echoing the government's position, have held that a judge may not impose a sentence materially different from that recommended by the Guidelines absent "extraordinary circumstances," *see, e.g., United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005), and some have deemed "per se unreasonable" *any* non-Guidelines sentence that is "based on a disagreement" with the Sentencing Commission's balancing of factors for categories of cases, *United States v. Kimbrough*, No. 05-4554 (4th Cir. 2006), *Kimbrough* Pet. App. 2a (referring to "disagreement with the sentencing disparity for crack and powder cocaine offenses"). As a result, many important sentencing factors that judges are duty-bound to consider must nonetheless be given no significant weight on the premise that the Sentencing Commission has supposedly already taken them into account and incorporated them into (or disallowed them under) the Guidelines system itself. *See, e.g., United States v. Hampton*, 441 F.3d 284, 289 (4th Cir. 2006) (below-Guidelines sentence where defendant was the sole custodial parent of two small children was unreasonable, because "[f]amily ties and responsibilities" are an expressly "discouraged factor" under the Guidelines).

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[2] Memorandum from James B. Comey, Deputy Attorney General, U.S. Department of Justice, to All Federal Prosecutors, re: Department Policies and Procedures Concerning Sentencing (Jan. 28, 2005) at 2, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf (emphasis added); *id.* at 1 (prosecutors must "take all steps necessary to ensure adherence to the Sentencing Guidelines"). Consistent with this directive, the AUSA in *Kimbrough* objected to *any* sentence other than that within the Guidelines range. *Kimbrough* Pet. App. 30a. Whether this Court's decision in *Rita v. United States*, 551 U.S. __ (2007), will serve to rein in that tendency remains to be seen.

There are two fundamental defects in these approaches. *First*, these two rules do at least as much violence to the Sixth Amendment as the law this Court struck down in *Blakely v. Washington*, 542 U.S. 296 (2004). Under that state statute, the judge was merely *allowed* to impose a sentence exceeding the maximum authorized by "*facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 303 (emphasis in original). To forbid a so-called substantial deviation from the range specified by the United States Sentencing Guidelines absent extraordinary circumstances—and without an opportunity to challenge the soundness of the judgment reflected in a Guidelines calculation—is more detrimental to the defendant's Sixth Amendment rights than the Washington provision. The federal judge's findings of fact would *require* imposition of a sentence greater than that authorized by the jury's findings unless *the defendant* carries the heavy burden of proving extraordinary mitigating circumstances. In the typical case—*i.e.*, one where extraordinary mitigating circumstances are not present—the result *must* be a sentence that "the jury's verdict alone does not authorize." *Id.* at 305. Such a "remedy" is foreclosed by the Sixth Amendment. *Booker*, 543 U.S. at 234 (holding mandatory Guidelines unconstitutional because the judge is "*bound*" to a within-Guidelines sentence in "most cases") (emphasis added).

Second, even if *Blakely* and *Booker* could permit a system that heavily relies on the Guidelines, the theoretical and empirical bases for these two tools of appellate review are demonstrably false. The Sentencing Commission decided it was not feasible to construct a system producing sentences designed to achieve each purpose of sentencing listed in Section 3553(a)(2). Moreover, the Commission did not, because it could not, implement a system that differentiates between particular defendants based on the Section 3553(a) factors, most notably differences in the "history and characteristics" of otherwise similarly-situated defendants. *See* 18 U.S.C. § 3553(a)(1). Thus, because certain Section 3553(a) factors as applied to a particular case may be at the same time both

"ordinary" and inadequately accounted for in the Guidelines, the rules imposed by the Fourth and Eighth Circuits in these two cases require district judges to abdicate their duties under Section 3553(a).

The proper formulation of reasonableness review—a formulation that complies with the Sixth Amendment, is true to the language of the SRA, and recognizes the limitations inherent in the Guidelines—is one that gives the district court appropriate deference under the abuse of discretion standard fashioned by this Court in *Rita* and *Booker* and that focuses on whether the district judge considered *all* of the pertinent statutory factors as they apply to that *particular* case. The court of appeals should also examine whether the judge, after considering those factors, complied with the duty to impose a sentence sufficient, but "not greater than necessary" to achieve the statute's purposes. 18 U.S.C. § 3553(a). This inherently individualized process is not aided by requiring extraordinary circumstances before a sentence can "deviate" from a so-called "benchmark" that was created for classes of cases and that will frequently be the product of an incomplete or even erroneous assessment of the very factors and purposes *judges* must consider on a case-by-case basis.

ARGUMENT

I. A Requirement Of Extraordinary Circumstances For Sentences That Differ In A Nontrivial Manner From Those Suggested By The Guidelines, And A Prohibition On Taking Into Account Whether The Guidelines Reflect An Unsound Judgment, Are Each Inconsistent With This Court's *Booker* Decision.

The Eighth Circuit's requirement of extraordinary circumstances for what it deems a substantial "variance" from the Guidelines violates the Sixth Amendment because in the application of that standard to the "ordinary" defendant—one whose circumstances fall short of "extraordinary"—the dis-

trict court not only is *permitted* to impose a sentence greater than that available based on jury findings alone; it is *required* to do so. The Sixth Amendment forbids either result. *See Blakely*, 542 U.S. at 305 n.8 ("Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.") (emphases in original). Similarly, the rule applied in *Kimbrough*—that it is "per se unreasonable" to rely on a "disagreement" with the judgment reflected in a Guidelines provision when justifying a sentence outside the recommended range—restricts the discretion of judges in a manner indistinguishable from the provision that was excised from the Sentencing Reform Act in order to make the Guidelines advisory. *See* 18 U.S.C. § 3553(b)(1). Thus, on constitutional grounds alone, these two modifications to the reasonableness standard of review for federal sentences must be rejected. This issue is properly before this Court because (i) both rules present a multitude of constitutional problems, and (ii) *Booker* held that Congress did not intend one set of rules for sentences above the Guidelines and a different set for those below.

A. The Standards Employed By The Fourth and Eighth Circuits Violate The Sixth Amendment.

1. The extraordinary circumstances requirement resurrects the feature of the mandatory Guidelines that violated the Sixth Amendment. Under the Eighth Circuit's test, a district court may not substantially "deviate" above or below the advisory range unless the judge finds facts that establish extraordinarily aggravating or mitigating circumstances. The less aggravating (or mitigating) the circumstances the judge finds, the smaller the allowed "deviation" from the advisory range. *See, e.g., United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006) ("How compelling [the] justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed."). The very phrasing of the Eighth Circuit's "extraordinary circum-

stances" requirement illustrates its inconsistency with the advisory Guidelines remedy adopted in *Booker*. The Eighth Circuit's formulation continues the pre-*Booker* requirement that district judges treat the Guidelines range as the presumptive sentence—a substantive starting point—with the reasonableness of any other sentence judged by the extent to which it "deviates" or "varies" from that presumptive range. Gall Pet. App. A 8-9 ("'the farther the district court varies from the *presumptively reasonable* guidelines range, the more compelling the justification based on the § 3553(a) factors must be'" (emphasis added) (citation omitted)). Such a presumption at the district court level for Guidelines sentences is no longer an option. *See Rita*, slip op. at 11-12 (emphasizing that the presumption of reasonableness for a within-Guidelines sentence only operates at the appellate level; it may not be used by district judges).

The extraordinary circumstances requirement thus restores the Guidelines to a position that violates the Sixth Amendment. In particular, because the circumstances in the mine-run of cases are—by definition—not "extraordinary," in most instances this rule prevents judges from imposing a sentence substantially outside the advisory range. Allowing judges to venture substantially above or below a Guidelines range in the "extraordinary" case is no cure for the Sixth Amendment defect, just as the mandatory Guidelines were not saved by the ability to depart in special cases. *See Booker*, 543 U.S. at 234 ("The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself."); *see also* 18 U.S.C. § 3553(b)(1) (provision that, until it was excised, permitted a sentence outside the Guidelines range only where there existed "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission").

Indeed, forbidding substantially higher or lower sentences absent a finding of extraordinary circumstances institutes a regime indistinguishable from that invalidated in

Blakely. The state law in *Blakely* similarly limited a defendant's sentence to a "standard range," dictated by the offense of conviction, unless the judge found "'substantial and compelling reasons justifying an exceptional sentence.'" 542 U.S. at 299. This Court held that a sentence above the standard range, based on the judge's finding that Blakely had acted with deliberate cruelty, violated the Sixth Amendment because it exceeded the penalty the judge could impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303 (emphasis omitted).

Unlike the appellate presumption of reasonableness upheld in *Rita*, the requirement of "extraordinary circumstances" presents a "multitude of constitutional problems" that are far from hypothetical. *Cf. Rita*, slip op. at 14. As noted, the constitutional problem will exist as to every "ordinary" defendant, for whom any significant "deviation" from the Guidelines is forbidden under the Eight Circuit's rule. Absent the defendant's waiver of his Sixth Amendment rights, judge-made findings will be involved in a significant number of these "ordinary" cases, and they will spell the difference between reasonable and unreasonable sentences under the Eighth Circuit test. For instance, in drug cases, which represent about 35% of all federal sentences,[3] the "base" offense level is determined largely by the quantity of drugs deemed "relevant" under a unique and complex set of rules set forth in the Guidelines. U.S. SENTENCING GUIDELINES MANUAL ("USSG") § 1B1.3. This "relevant" quantity can include drugs involved in counts that were dismissed, and

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[3] U.S. Sentencing Commission, *2006 Sourcebook of Federal Sentencing Statistics*, Distribution of Offenders in Each Primary Offense Category, *available at* http://www.ussc.gov/ANNRPT/2006/Figa.pdf (for 35.5% of sentenced defendants, drug violations were the primary offense). The available data for fiscal year 2007 show a small increase. U.S. Sentencing Commission, *Preliminary Quarterly Data Report (2nd Quarter Release 2007)* at 39, *available at* http://www.ussc.gov/sc_cases/Quarter_Report_2Qrt_07.pdf (36.3% of sentenced defendants).

even counts of which the defendant was acquitted or for which there was no charge at all. *See, e.g., United States v. Watts*, 519 U.S. 148 (1997) (per curiam).[4]

Fanfan's case (which was consolidated with Booker's) illustrates the problems faced by virtually all drug defendants under the extraordinary circumstances test. The findings by the jury convicting Fanfan supported a Guidelines range of 63-to-78 months. *Booker*, 543 U.S. at 228. The extraordinary justification rule, however, would have compelled Fanfan's judge to sentence him within or not significantly outside the 188-to-235 month range based on *judicially*-found facts. Indeed, the court would have been required to sentence Fanfan to well above the *maximum* of the range supported solely by the jury's findings unless *the judge* could find *additional*, mitigating facts—facts extraordinary enough to support a sentence almost ten years below the judicially-determined range.

Many other Guidelines also dictate higher sentence ranges based on findings made by the judge rather than the jury, not the least of which are those for theft and fraud cases. *See* USSG § 2B1.1 (numerous aggravating factors, including potentially significant enhancements for amount of loss); *2006 Sourcebook of Federal Sentencing Statistics* (10 percent

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[4] Moreover, the Guidelines Manual contains many more levels of gradation for drug quantity than does the statute defining the offense. *Compare* 21 U.S.C. § 841(b)(1) (containing three levels of penalty gradation due to drug quantity for most controlled substances, including cocaine, cocaine base (crack), heroin and marijuana) *with* USSG § 2D1.1(c) (containing at least 14 different offense levels for such drugs). The Guidelines, rather than mandatory minimums, dictate the sentence in a large number of drug cases. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* ("*Fifteen Year Report*") (2004), http://www.ussc.gov/-15_year/15year.htm (determining that, as of 2001, more than 25 percent of the average expected prison time for drug offenders can be attributed to Guideline increases above the statutory mandatory minimum penalty levels).

of cases). In sum, the extraordinary circumstances requirement *compels* sentences within or proximate to sentencing ranges enhanced by judicial fact-finding—that is, facts neither found by the jury nor admitted by the defendant—in all but the most exceptional cases, much like the unconstitutional "mandatory guidelines" system did before *Booker*.

In its brief in *Claiborne v. United States*, No. 06-5618, the government defended the extraordinary circumstances test against a Sixth Amendment challenge by arguing that under the advisory Guidelines a judge retains the authority, armed solely with jury findings, to impose a sentence up to "the statutory maximum provided in the United States Code." Resp. Br. in *Claiborne* 41-42. But under the government's extraordinary circumstances test, that simply is not true. The jury finds the bare elements of an offense, and such findings—because they are the same for any trial involving the same alleged statutory violation—do nothing to establish why the particular case might be extraordinary, let alone extraordinary enough to warrant the statutory maximum sentence. *See* Resp. Br. in *Claiborne* 43 (identifying "extraordinary circumstances" as those factors that "substantially distinguish [the defendant] from the hundreds of other defendants who share the same general characteristic."); *see also Cunningham v. California*, 549 U.S. __, __ (2007), slip op. at 6 (Alito, J., dissenting) (noting that a judge would not be able to justify the statutory maximum sentence in a mail fraud case without finding additional facts at sentencing).

The government argues that the "extraordinary circumstances" test has no application to insubstantial "variances" from the Guidelines range in non-extraordinary cases. *See* Resp. Br. in *Claiborne* 38. This is not so. Many circuits apply the test to require additional factfinding for *any* non-Guidelines sentence. *See* Gall Br. 10 n.2. In any event, it would not cure the Sixth Amendment violation to know that insubstantial "variances" from the Guidelines range could be accomplished without additional non-jury findings. Even *that* version of the extraordinary circumstances test does

nothing more than resurrect mandatory Guidelines ranges with an "insubstantial" number of months tacked on to each end of the range.[5] The result of the government's test, there-

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[5] It is far from clear how one determines when the line between insubstantial and substantial (or between ordinary and extraordinary) has been crossed. *See* Gall Pet. App. A 9 ("extraordinary" variances); *Claiborne*, 439 F.3d at 481 ("substantial" variances). Even if such a line could be devised in theory, it would be unworkable in practice due to the presence of many variables and the non-uniform structure of the table of sentencing ranges. These features prompt multiple questions for which there are no easy answers. For example, should "substantial" or "extraordinary" variances be based on the absolute number of months or a percentage calculation? The choice has a significant effect, especially at the low and high ends of the sentencing table. How should the breadth of the range affect the drawing of the line? The sentence ranges in the Guidelines Manual vary greatly in their breadth—as few as six months between top and bottom at the low end of the table; as many as 81 months near the high end—and others defy quantification altogether, such as "360 months to life" and "life." Should a substantial upward variance from a particular range always be the same number of months (or percentage difference) as a substantial *downward* variance from the same range, or should "substantial upward" mean something different than "substantial downward" depending on where the range falls in the table? Near the high and low ends of the table a percentage approach would lead to very different results than an absolute approach. How are probationary sentences—such as petitioner Gall's—accounted for, especially when they can come with conditions that are akin to imprisonment (*e.g.*, home confinement, confinement in a community correctional center, confinement in a jail on weekends), or conditions less like imprisonment but nonetheless onerous (*e.g.*, travel restrictions, reporting requirements, and employment and community service mandates, all of which can differ significantly from case-to-case in their severity), or varying combinations of the two. (The Eighth Circuit would deem *any* non-Guidelines sentence of probation, no matter how low the minimum of the Guidelines range, "a 100% downward variance" because the defendant "will not serve any prison time." Gall Pet. App. A 9. But probation is not like a shorter prison term; it is an entirely different kind of sentence. 18 U.S.C. § 3551.) Whatever the answers to these questions, the government's test assumes that for any given Guidelines range a number of months above and (perhaps a different) number of months below the range will mark the dividing line between ordinary/insubstantial and extraordinary/substantial variances.

fore, is a new *de facto* set of Guidelines ranges—a bit larger than the ranges in the Manual,[6] but ranges nonetheless. Instead of a requirement of extraordinary circumstances to sentence outside the ranges in the Manual, the proposed test requires extraordinary circumstances to impose a sentence outside the somewhat larger *de facto* range.[7] Nothing in *Booker* supports the notion that Congress can cure the Sixth Amendment violation by reinstituting mandatory Guidelines ranges and simply making them a bit wider. The courts of appeals are likewise barred from creating such a remedy through the reasonableness standard of review.

2. The rule applied by the Fourth Circuit in *Kimbrough* suffers from the same constitutional defect. It prevents a sentence from being based, even in part, on the judge's reasoned conclusion that the Commission struck an improper balance when weighing Section 3553(a) factors for a particular category or sub-category of offenses. *Kimbrough* held it was "per se unreasonable" for a non-Guidelines sentence to be based to any extent on the court's "disagreement with the sentencing disparity for crack and powder cocaine offenses." *Kimbrough* Pet. App. 2a. The Sentencing Commission itself has recognized that the purposes of punishment do not invariably require that trafficking in a given amount of crack be treated the same as trafficking in 100 times that amount of

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[6] By statute (and with limited exceptions), the top of a sentencing range may be no more than 25 percent greater than the bottom of that range. 28 U.S.C. § 994(b)(2). For example, the Guidelines are allowed to (and do) have a range of 100-to-125 months, but they could not have a range of 100-to-140 months.

[7] Another example illustrates the constitutional violation. Suppose a defendant's Guidelines range is 33-to-41 months, and the statutory maximum is 120 months. Assuming any sentence greater than 60 months would be a "substantial variance," a judge could not impose such a sentence without finding the existence of extraordinary circumstances. Any sentence between 60 and 120 months would therefore exceed the maximum authorized by facts reflected in the jury verdict or admitted by the defendant.

powder cocaine. U.S. Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002). The sentencing judge in *Kimbrough* reasoned from the available information that the differences between the circumstances of petitioner's crack offense and the circumstances of many powder cocaine offenses were not so great as to require imposition of the dramatically more severe within-Guidelines sentence.[8] The Fourth Circuit's holding prevents a judge from ever concluding that the Commission's "wholesale" rule for crack offenses creates sentences greater than necessary at the "retail" level of sentencing. *Cf. Rita*, slip op. at 9 (noting that the Commission and the sentencing judge separately carry out the Section 3553(a) objectives: "the one, at retail, the other at wholesale").

Judges must be free to conclude, based on reasoned analysis, that the Commission's balancing of factors produces sentences that are either too lenient ("[in]sufficient") or too severe ("greater than necessary"). If not, then their discretion will be at least as limited as it was under the mandatory regime that this Court invalidated on Sixth Amendment grounds. Section 3553(b)(1), now excised, had required judges to impose a Guidelines sentence unless they found "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines" and that "should result in a" non-Guidelines sentence. To prohibit sentencing courts from questioning the Commission's judgment with respect to those circumstances that it *did* take into consideration in formulating the Guidelines is to limit the judicial inquiry to whether the Commission in fact took the

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[8] The district judge did not treat crack and powder cocaine on anywhere near an equal footing. Had the crack cocaine that Kimbrough possessed still been in powder form, he would have faced no mandatory minimum term and could have received a within-Guidelines sentence of 30 months rather than the 120 months the court imposed for that count. *Kimbrough* Pet. App. 22a.

circumstances into consideration *at all*. Because that is at least as narrow as the inquiry whether the Commission "adequately" took a circumstance "into consideration," the rule adopted by the Fourth Circuit simply resurrects the provision that this Court excised to cure the Sixth Amendment defect in the Guidelines.

3. Given the restraints imposed by the Fourth and Eighth Circuits, it should come as no surprise that reasonableness review in those courts has prevented judges from imposing non-Guidelines sentences unless they meet the criteria for departures under the mandatory regime. *See, e.g.*, *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005) (below-Guidelines sentence based on the defendant's cooperation was unreasonable, because that "departure" exceeded the Guidelines' limits on "substantial assistance" downward departures); *United States v. Green*, 436 F.3d 449, 459 (4th Cir. 2006) (reversing below-Guideline sentence based on the defendant's efforts to obtain employment, his level of education, the non-use of a firearm, and his likelihood of contributing to society, because those factors are excluded from the Guidelines).

These courts have simply resurrected 18 U.S.C. § 3742(e)—the appellate review provision excised in *Booker*. That statute directed courts of appeals to determine, among other things, whether a sentence "departs from the applicable guideline range based on a factor that . . . is not authorized under section 3553(b)" or "departs to an unreasonable degree from the applicable guidelines range, having regard for" the Section 3553(a) factors and the reasons stated by the district court. 18 U.S.C. § 3742(e)(3). The Fourth Circuit's rule prevents judges from sentencing outside the Guidelines unless the factor is "authorized under section 3553(b)" (that is, unless the Commission has failed to adequately take the circumstance into account), and the Eighth Circuit's rule examines whether the sentence "departs to an unreasonable degree from the applicable guidelines range." Just as Section 3742(e) needed to be excised to effectuate the remedy

adopted in *Booker*, the Sixth Amendment bars the adoption of appellate review tools that largely revive the mandatory Guidelines system. Under the "extraordinary deviation" rule, it is exactly as if § 3553(b)(1) had never been stricken from the statute. But it was the judicial striking of that section that rescued the Act from its constitutional flaw. It follows that the tests applied below revive the Sixth Amendment violation thought to have been remedied in *Booker*.

B. The Sixth Amendment Issue Is Properly Before The Court.

The Sixth Amendment forbids sentences greater than those authorized by the jury's findings. Petitioners Gall and Kimbrough received sentences *below* the Guidelines ranges that were calculated in their cases, and the courts of appeals reversed using the rules of appellate review at issue here. The Court must reject these rules on Sixth Amendment grounds, regardless of whether their application in these two cases violated petitioners' constitutional rights. That is because (i) both rules present a multitude of constitutional problems, and (ii) *Booker* held that Congress did not intend one set of rules for sentences above the Guidelines and a different set for those within or below the Guidelines. *Booker*, 543 U.S. at 266; *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (in deciding between two interpretations of a statute, "[i]f one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain *to the particular litigant before the Court*.") (emphasis added).[9]

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[9] That is not to say, however, given the statute's preference for the more parsimonious sentence, that review of sentences above the recommended range should not be subject to more stringent scrutiny than is applied to sentences within or below. The more severe the sentence, after all, the more likely it is to be "greater than necessary." 18 U.S.C. § 3553(a).

In *Rita*, the Court rejected the petitioner's Sixth Amendment "concerns," *Rita*, slip op. at 12, holding that an appellate presumption of reasonableness for a Guidelines sentence "does not violate the Sixth Amendment." Slip op. at 13. In particular, the Court noted that this "nonbinding appellate presumption . . . does not *require* the sentencing judge" to impose a Guidelines sentence, and "[s]till less does it *forbid* the sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone." *Rita*, slip op. at 14 (emphases in original). The same cannot be said for the rules at issue in *Gall* and *Kimbrough*. As noted *supra*, if a judge needs to find extraordinary circumstances to impose a sentence significantly higher than the judicially-determined sentence range—let alone a sentence significantly higher than that authorized by the jury's verdict—then the Eighth Circuit's requirement *does* forbid the judge from "imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone." The judge in *Fanfan*, for example, could not have imposed a sentence above or even *within* the petitioner's Guidelines range of 188-to-235 months based solely on jury-determined facts. *Booker*, 543 U.S. at 228.

As the Court made clear in *Rita*, an appellate presumption of reasonableness for a within-Guidelines sentence is not a presumption of unreasonableness for a non-Guidelines sentence. *Rita*, slip op. at 15. *Rita* therefore had no occasion to address when a non-Guidelines sentence might be unreasonable. The instant cases squarely present the issue. Moreover, under this Court's rulings in *Booker* and *Clark*, review for reasonableness for sentences below the Guidelines must be fashioned in such a manner that application of the same rule to sentences *above* the Guidelines does not violate the Sixth Amendment. *Clark*, 543 U.S. at 380-81; *Rita*, slip op. at 7 n.2 (Scalia, J., concurring) ("since reasonableness review should not function as a one-way ratchet, *United States* v. *Booker*, 543 U.S. 220, 257-258, 266 (2005), we must forswear the notion that sentences can be too low in light of the need to abandon the concept that sentences can be too high").

To avoid the Sixth Amendment violations that would occur in many scenarios if the rules adopted by the Fourth and Eighth Circuits rules were allowed to stand, those rules must be rejected in these cases, too.

On constitutional grounds alone, the standards of review used in the Fourth and Eighth Circuits must be rejected.

II. Because Of The Inherent Limitations Of Any Guidelines System, And The Demonstrated Limitations Of The One In Place, A District Court Must Be Permitted To Conclude That The Guidelines Do Not Always Strike The Correct Balance And That Materially Different Sentences Are Justified In The Absence Of Extraordinary Circumstances

The Eighth Circuit's principal basis for requiring extraordinary circumstances for sentences significantly outside the Guidelines is that they supposedly "were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study," *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006). As demonstrated below, despite aspirations to the contrary, the Guidelines do not manage to balance and incorporate *all* of the purposes of sentencing found in Section 3553(a)(2), much less do they differentiate individual defendants from one another based on *all* of the other factors a judge must consider under Section 3553(a) in each case. The Commission itself acknowledged, when first promulgating the Guidelines, that it was impossible to devise a guidelines system that captures and accounts for "the vast range of human conduct potentially relevant to a sentencing decision." USSG ch. 1, pt. A(4)(b) (1987). At best, the Guidelines, "insofar as practicable," represent "*a rough approximation* of sentences which *might* achieve § 3553(a)'s objectives." *Rita*, slip op. at 11 (emphases added). And while it is true that the Commission's amendment process was designed to carry out a continued refinement of the Guidelines to better approach these aspirations, in practice it

has not performed in that manner. Rather than move the Guidelines in the direction of balancing and incorporating Section 3553(a)'s sentencing purposes and factors, the amendment process has had the opposite effect.

A. The Guidelines Are Not The Product Of A Flawless Balancing Of All The Sentencing Purposes That A Judge Must Consider Under Section 3553(a)(2), But Of An Incomplete Empirical Approach Based On "Past Practice."

Section 3553(a)(2) of Title 18 requires judges to impose sentences that, among other things, "comply with" the following "purposes" of sentencing in each particular case: "reflect the seriousness of the offense"; "promote respect for the law"; "provide just punishment for the offense"; "afford adequate deterrence to criminal conduct"; "protect the public from further crimes of the defendant"; and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." The judge must do so after "consider[ing]" other factors listed, inter alia, in § 3553(a)(1) and (a)(6).

One of the Commission's basic objectives is also to "assure the meeting of the purposes of sentencing as set forth in [§ 3553(a)(2)]." 28 U.S.C. § 991(b). As early as the first Guidelines Manual in 1987, the Commission acknowledged, however, that it was unable to take each of these purposes of sentencing into account in crafting Guidelines ranges. *See* USSG ch. 1, pt. A(3) (1987). This Court recognized as much in *Rita*, when it noted that the Commission did not attempt to balance (*i.e.*, "reconcile") the purposes of sentencing, taking an "empirical approach" instead. *See Rita*, slip op. at 9-10 (noting a "'philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment'" and that, "[r]ather than choose among [such] differing practical and philosophical objectives, the Commission took an 'empirical approach'"). As one original commissioner explained, "[r]ather than being

guided by the statutory purposes of sentencing, the guideline drafting reflected simply a haphazard 'fiddling with the numbers' that established the guidelines sentences." *Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission*, 52 Fed. Reg. 18,121, 18,122 (May 1, 1987).

In the end, even the "past practice" benchmark was abandoned as to a large number of categories; the Commission chose to increase sentences for some offenses, but not others, through a series of "'trade-offs' among Commissioners with different viewpoints." Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19 (1988). Over time, these "trade-offs" have worked to substantially lengthen sentences[10]—and so has the Commission's peculiar interpretation of "past practice," which has produced Guidelines ranges which do not reflect the large number of prior sentences that had resulted in probation. *See* Washington Legal Foundation Amicus Br. in *Claiborne* 11-12.

In sum, although the Commission may very well have done the best it could under the circumstances, it is abundantly clear—as this Court noted in *Rita*—that the ranges in that Manual are *not* the product of a *balancing* of the sentencing purposes every judge is required to consider under Section 3553(a)(2). And the Commission was never directed to incorporate most aspects of § 3553(a) other than the (a)(2) purposes into the Guidelines, even though those other factors are binding on judges in individual cases. As a result, the Guidelines may point to a result different from that obtained by a careful judicial balancing of those purposes even in so-called "ordinary" cases. For that reason, an extraordinary

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[10] Defendants sentenced in 2002 will spend, on average, twice as long in prison as those sentenced prior to the Sentencing Reform Act. *Fifteen Year Report* at 46, 47, and 49.

circumstances requirement has no place in an advisory Guidelines system.

B. The Guidelines Do Not Account For Important Section 3553(a) Factors, Such As The "History And Characteristics Of The Defendant."

In addition to their failure to take account of—much less carefully balance—each purpose of sentencing listed in Section 3553(a)(2), the Guidelines were not designed to differentiate between defendants with respect to the other Section 3553(a) factors that judges must consider but which the Commission was not directed in 28 U.S.C. § 991(b) or § 994 to implement. The Commission was charged, after all, with developing Guidelines applicable to "categories of offenses" and "categories of defendants," *id.* §§ 994(c)-(d), not with selecting sentences for individual cases.

1. Significantly, the Guidelines do not implement a vital component of subsection (a)(1)—the need to consider the "history and characteristics of the defendant." From the beginning, the Guidelines have produced sentencing ranges that take into account only one narrow slice of a defendant's "history and characteristics": the aggravating factor of prior criminal history. *See generally* USSG ch. 4. The original commissioners "extensively debated" whether the Guidelines ranges should be affected by offender characteristics beyond the defendant's criminal record, Breyer, 17 Hofstra L. Rev. at 19, but they were unable to reach a consensus and therefore decided "to leave other characteristics out." Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 185 (1999).

The Guidelines ranges do not incorporate any other offender characteristics or any other aspects of their history. Instead, to the extent the Commission has addressed these factors, it expressly discourages or outright prohibits judges from considering them when computing a Guidelines range or when deciding whether to impose a Guidelines sentence.

These characteristics include, among others, family ties and obligations, USSG § 5H1.6 (p.s.), military service, *id.* § 5H1.11 (p.s.), community good works, *id.*, addictions and other dependencies, *id.* § 5H1.4 (p.s.).

The Commission's inability to incorporate these offender characteristics into the computation of a Guidelines range is unsurprising. It is *not* possible to quantify in a meaningful way—*i.e.*, one that differentiates defendants in the current grid of sentence ranges—such factors as a defendant's family obligations; the influence of addiction or other dependencies and difficulties on the commission of the offense; or the degree to which the defendant engaged in good works before or after committing the offense.[11] As one judge has observed, the Guidelines are "inescapably generalizations" that 'say little about the 'history and characteristics of the defendant.'" *United States v. Jiménez-Beltre*, 440 F.3d 514, 527 (1st Cir. 2006) (Lipez, J., dissenting). Moreover, an offender characteristic that warrants a significant sentence reduction in one case (*e.g.*, a history of strong family ties and responsibilities) might be less compelling than otherwise would be the case if coupled with other factors (*e.g.*, the defendant made a calculated decision to entice close family members into joining his criminal activity despite having a strong support system that gave him ample opportunity to lead a law-abiding life). Because the weight to be given any particular offender characteristic requires careful case-by-case consideration of the interplay of multiple factors, such characteristics are inherently unsuited to the generalizations required in any guidelines system.

As a result of the difficulty in accounting for offender characteristics in a system that must quantify and generalize

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[11] The one factor the Commission did incorporate—prior criminal history—is, in a number of ways, susceptible to an objective formula based on the number of prior convictions, the recency of past offenses, and their severity (as measured by length of sentence imposed or served). *See* USSG ch 4.

factors, with the exception of the aggravating factor of criminal history the Guidelines are focused *entirely* on the offense as opposed to the person who committed it. But even there they frequently fail to differentiate based on such things as criminal intent.[12] In choosing not to delineate "categories of defendants" based on these and other aspects of their offenses, the Guidelines cannot be said to already account for the factors in Section 3553(a)(1), particularly as those factors may arise in individual cases.

C. The Guidelines Have Not Eliminated Unwarranted Sentence Disparities.

Another statutory factor that judges must consider is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Minimizing such disparities was one of the primary objectives of the Sentencing Guidelines, 28 U.S.C. § 994(f), but in a number of ways, the Guidelines have perpetuated and even aggravated the problem of unwarranted disparities.

As the Sentencing Commission has recognized, "unwarranted disparity" means the "[1] different treatment of *individual* offenders who are similar in relevant ways, or [2] similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing." *Fifteen Year Report* at 113 (emphasis in original). The Guidelines, by limiting consideration of numerous factors

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[12] Even when considered, intent works in only one direction. Intended harms increase the sentence even if they do not occur. *See, e.g.*, USSG § 1B1.3(a)(3) (including "all harm that was the object" of acts and omissions) & 2D1.1. cmt. n.12 (drug quantity includes amounts attempted or agreed upon). Yet no reduction is made to account for harms that were unintended or controlled by law enforcement. *See, e.g., id.* (addressing controlled drug deliveries); *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004) (noting that loss amount in many fraud cases "is a kind of accident" and thus a "relatively weak indicator of the moral seriousness of the offense or the need for deterrence").

and circumstances (age, employment, military service, rehabilitation), have increased the second type of unwarranted disparity—*the like treatment of cases that are not truly alike.* Ilene Nagel, one of the original commissioners, acknowledged this problem—she dubbed it the "overreaching uniformity" of the Guidelines—noting that "the emphasis [in creating the first set of guidelines] was more on making sentences alike, and less on insuring the likeness of those grouped together for similar treatment." Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 934 (1990).

The Guidelines also suffer severe shortcomings in addressing the other type of disparity—different treatment of individual offenders who are similar in relevant ways. Numerous studies have confirmed that because charge- and fact-bargaining occurs in a sizable number of cases, Guidelines ranges for defendants who should be identical in the eyes of the Guidelines will often be different.[13] For example Professor Stephen Schulhofer and former-Commissioner Nagel found that the Guidelines were circumvented in approximately twenty to thirty-five percent of all plea-bargains, Ilene Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1284, 1290 & n.25 (1997), with the extent of the deviations from appropriate guideline calculations ranging between "modest" (ten to twenty-five percent) and "enormous" (seventy to ninety per-

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[13] Additionally, far from helping eliminate nationwide disparities as the government claims, the Guidelines have contributed to geographical disparities. *Fifteen Year Report* at 86; *see also* U.S. Sentencing Commission, *Downward Departures from the Federal Sentencing Guidelines*, at 66-67 (2003), http://www.ussc.gov/departrpt03/departrpt03.pdf ("Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs.").

cent), *id.* at 1292.[14] Ironically, it is the so-called "real offense" provisions (*e.g.*, the weapon and quantity enhancements in drug cases and the loss amount for economic crimes)—the centerpiece of guidelines sentencing (*see, e.g.*, *Fifteen Year Report* at 24-25)—that provide the most fertile ground for abusive plea negotiating tactics. *See* Nagel, 80 J. Crim. L. & Criminology at 937.[15]

Perhaps the most troubling manifestation of unwarranted sentencing disparity prevalent in the current guidelines system is the gap between average sentences of white and minority offenders. "[R]elatively small in the preguidelines era," this gap has grown substantially since the advent of the Guidelines. *Fifteen Year Report* at 115, 116, 120-27. The Commission itself has concluded that these disparities are not "a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges"; rather they are attributable to an "'*institutional unfairness*' *built into the sentencing rules themselves*." *Id.* at 135 (emphasis added) (internal citation omitted). Although the Commission specifically identified the 100:1 quantity ratio for powder and crack cocaine—a

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[14] Similarly, the federal probation offices in forty-three percent of all districts report that when "guideline calculations are set forth in a plea agreement, they are supported by offense facts that accurately and completely reflect all aspects of the case" *no more than half* the time. *Fifteen Year Report* at 86 (internal quotations and citations omitted). And in yet another survey, this one conducted by the Federal Judicial Center, three-quarters of district judges reported that plea bargaining is a "source of hidden unwarranted disparity in the guidelines system." Federal Judicial Center, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey* at 7, 9 (1997), *available at* http://www.fjc.gov/-public/pdf.nsf/lookup/gssurvey.pdf/SFile/gssurvey.pdf.

[15] In addition, there is the inevitable distorting effect of unintentional error by Probation Officers, attorneys and judges, much of it resulting from the very complexity of the Guidelines system itself. Unwarranted disparity which the Guidelines cannot control also results from the inevitable variation in skill and knowledge among defense counsel, a subject with which amicus NACDL is particularly familiar.

ratio that substantially increased petitioner Kimbrough's Guidelines range—and the career offender Guideline as provisions that have "unwarranted adverse impacts on minority groups without clearly advancing a purpose of sentencing," it acknowledged there may be "many others." *Id.* at 131-34. A Guidelines system that *increases* racial disparities in sentencing cannot be a benchmark from which only "extraordinary circumstances" warrant materially different outcomes.

Accordingly, the Guidelines should not be followed simply because that would achieve greater uniformity, as the government claims. Not only is uniformity just one of several considerations under Section 3553(a), but rigid adherence to the Guidelines will not advance that objective. In fact, in Kimbrough's case, imposing a *below*-Guidelines sentence reduces unwarranted disparity by treating him like similar low-level offenders.

D. The History Of Amendments To The Guidelines Further Undermines Any Argument For Applying The Rules Employed In The Fourth And Eighth Circuits.

Another reason advanced for requiring proportionally "substantial" circumstances for non-Guidelines sentences is that the Guidelines have been refined over time based on several years of sentencing experience and studies. The history of the Guideline amendment process thoroughly refutes this argument, demonstrating that the amendment process has proven incapable of incorporating Section 3553(a)'s purposes and other sentencing factors into the Guidelines—even though Congress, the Commission, and this Court envisioned such a process, *see Mistretta v. United States*, 488 U.S. 361, 379 (1989); 28 U.S.C. § 994(o).

When the original Commission determined it could not base its Guidelines ranges on a principled application of the statutory purposes of sentencing listed in Section 3553(a)(2), it intended to make up for that shortcoming in later revisions:

(1) incorporating the findings of the Commission's "continuing research, experience, and analysis," *id.* at pt. A(2); and (2) developing a sentencing "common law," whereby judges would "remain free to depart from the Guidelines' categorical sentences," transmitting their reasons for doing so to the Commission, which would then revise the Guidelines to incorporate the common practices of the judiciary. Breyer, 11 Fed. Sent. R. at 183, 185 (the original choices were to be "subject to revision in light of Guideline implementation experience"); *see also Booker*, 543 U.S. at 263.

Experience, however, has not measured up to these aspirations. In fact, the amendments have been notable for their relentless addition of factors that increase offense levels (the cumulative effect of the 696 amendments has been a "one-way upward ratchet" in sentencing),[16] and further restrict the ability of judges to consider, among other things, the history and characteristics of defendants, all without the benefit of studies that tie the increases to the purposes of sentencing.[17]

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[16] Frank O. Bowman, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005). *See also, e.g., Fifteen Year Report* (Sentencing Commission) at 137-38 (discussing the negative impact of "factor creep" on the Commission's efforts to tie offense levels to offense seriousness); Jeffrey S. Parker (Former Deputy Chief Counsel to the Commission) & Michael K. Block (Former Commissioner), *The Limits of Federal Sentencing Policy; Or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001, 1019 (2001) (noting that the Commission has lapsed into enacting "gratuitous increases in punishment levels that ha[ve] no basis in either principle or practice, and instead [are] essentially political decisions reflecting responses to interest group pressures"); *id.* at 1033-34. Of the nearly 700 amemdments to the Guidelines (USSG App. C (2006)), only a handful have operated to decrease the length of some sentences. *See* Amy Baron-Evans, *The Continuing Struggle for Just, Effective, and Constitutional Sentencing After* United States v. Booker*: Why and How the Guidelines Do Not Comply with § 3553(a)*, 30 Champion 32 at n.39 (2006).

[17] *See* Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* at 56 (1998) ("Nowhere in the forest of directives that the Commission has promulgated over the last decade can

(*footnote continued on next page*)

Even criminal history—the single "offender" characteristic accounted for in the Guidelines—does not produce results that can be presumed to reflect the purposes of sentencing or other sentencing factors. Due to "pressing congressional deadlines," the Commission was unable to validate its criminal history measure with its studies. U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* ("*Measuring Recidivism Report*") at 1 (2004), *available at* http://www.ussc.gov/publicat/recidivism_general.pdf.

The Commission's analysis, which tested these premises seventeen years later, demonstrates quite compellingly that many of the offender characteristics the Commission has ruled off-limits—age, educational level, employment status, and so on—are indeed strong predictors of recidivism. *See Measuring Recidivism Report* at 16 ("Investigations using the recidivism data suggest that there are several legally permissible offender characteristics which, if incorporated into the criminal history computation, are likely to improve predictive power.").[18] Yet the ranges computed under the Guidelines do not account for any of these offender characteristics.[19] In

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one find a discussion of the rationale for the particular approaches or definitions adopted. . .; nor can one find any efforts to justify the particular weights it has elected to assign to various sentencing factors.").

[18] For example, the Commission found that recidivism rates are strongly correlated to age (35.5% for offenders under 21 versus 9.5% for offenders over 50), educational level (31.4% for offenders with less than a high school education versus 8.8% for offenders with a college degree), and employment status (32.4% for offenders who were not steadily employed in the year before their arrest versus 19.6% for offenders who were steadily employed during this period). *Id.* at 12-14.

[19] The problem is magnified by the Commission's initial decision to deviate upward from the "historical averages" for a particular category of defendants—those who had previously received probationary sentences for "certain economic crimes." USSG ch. 1, pt. A(4)(d) (1987)—notwithstanding Congress's directive that the Guidelines "reflect the gen-

(*footnote continued on next page*)

light of these factors, which are not considered in the Guidelines system, the district court in petitioner Gall's case properly considered that his rehabilitation, education, employment, and independent withdrawal from the conspiracy warranted a non-Guidelines sentence.

The development of the sentencing "common law" has also fallen short of expectations, largely because the Commission has consistently acted to remove the district judges' power to take *all* sentencing factors into account. In the early years of Guidelines sentencing, judges did depart from the Guidelines where the ranges did not adequately account for the individualized circumstances of the cases before them, such as military service, civic contributions, charitable activities, and other factors. Instead of taking such feedback into account, the Commission adopted several amendments that discouraged, or outright prohibited, such departures.[20] Thus, as one commentator recently noted, "the idea that feedback

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eral appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." *See* 28 U.S.C. § 994(j). Although the Commission's own findings from the recidivism data support the creation of a "first offender" criminal history category that would help carry out the directive in Section 994(j), *see* U.S. Sentencing Commission, *Recidivism and the "First Offender"* (2004), *available at* http://www.ussc.gov/publicat/Recidivism_First-Offender.pdf, the Guidelines still have not been amended to do so.

[20] *See* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 Stan. L. Rev. 277, 284 & n.33 (2005) (tracing the addition of § 5H1.12, prohibiting departures based on "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing," to *United States v. Floyd*, 956 F.2d 203 (9th Cir. 1991)); Judy Clarke, *The Sentencing Guidelines: What a Mess*, 55 Fed. Probation 45 (1991) (tracing the 1991 addition of § 5H1.11, which discourages the consideration of a defendant's military service, civic contributions, charitable activities, and "other similar prior good works," to *United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990), and *United States v. Pipich*, 688 F. Supp. 991 (D. Md. 1988)).

from front-line sentencing actors is an important component of the federal sentencing model has somehow been lost. Instead, . . . sentences outside the otherwise applicable guideline range have come to be viewed as illegitimate, even deviant." Frank O. Bowman, III, *Year of Jubilee . . . or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System after Booker*, 43 Hous. L. Rev. 279, 321 (2006).

E. The Rules Imposed By The Fourth And Eighth Circuits Are Inconsistent With The Standard Of Review Articulated By This Court In *Rita* And *Booker*

To be faithful to the remedy in *Booker*, and in recognition of the fact that the Guidelines have been—and are inherently—unable to incorporate Section 3553(a)'s sentencing purposes and factors, district courts must have the latitude to treat the Guidelines as truly advisory. This includes the power to make a reasoned determination that the Guidelines do not always reflect a proper balance of the statutory considerations, as well as the ability to conclude that for reasons apart from a "heartland" analysis the sentence should not substantially equate with that recommended by the Manual.

As demonstrated above, the Guidelines do not—and cannot—produce sentence ranges that take account of *each* factor and purpose a judge is required by law to consider. As this Court explained in *Rita*, emphasizing the differing roles of the Commission and the judge, this limitation is inherent in any system of Guidelines. In a sentencing proceeding, the factors a judge must consider are numerous, and the interplay of those factors with each other and with the purposes of sentencing is complex. Further complicating matters, many of those factors and purposes cannot be quantified or otherwise converted to a form in which they possess a common denominator. Thus, even if the factual input is accurate, a Guideline computation gives a judge nothing more than the ability to compare a limited number of factors in one case to the same categories of factors in other cases. That computation is in-

herently incapable of producing a benchmark (a presumptively accurate "answer") because such a computation cannot take into account much of the input necessary to the process.

As a result of these limitations, it is entirely appropriate for district judges to inquire whether a Guidelines sentence "fails properly to reflect § 3553(a) considerations[.]" *Rita*, slip op. at 12. Such an analysis encompasses whether "the Guidelines reflect an unsound judgment," or whether they "generally treat certain defendant characteristics in the proper way." *Id.* at 18 (identifying types of sentencing arguments that require judges to provide a more detailed statement of reasons for the sentence imposed). Because certain Section 3553(a) factors as applied to a particular case may be both "ordinary" and unaccounted for in the Guidelines, the rules applied by the Fourth and Eighth Circuits prevent judges from engaging in such an inquiry.

The rules employed in these two cases also fail to afford appropriate deference to district judges, who have an institutional advantage in evaluating the full mix of sentencing factors presented in a particular case. *See Rita*, slip op. at 11 (noting that *Booker* held that "'reasonableness' review merely asks whether the trial court abused its discretion"); *Koon v. United States*, 518 U.S. 81, 98 (1996) (recognizing the district courts' "institutional advantage over appellate courts" in determining how cases compare to one another). Ironically, if the government's version of reasonableness review prevails, judges will have less flexibility than when the guidelines were mandatory. *Koon*, 518 U.S. at 98 (justifying deference because district courts "see so many more Guidelines cases than appellate courts do"). For it was under the mandatory regime that this Court observed, "the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Id.*; *see also United States v. Diaz-Villafane*, 874 F.2d 43, 49-50 (1st Cir. 1989) ("District courts are in the front lines, sentencing flesh-and-blood defendants. The dynamics of the situation may be difficult to gauge from

the antiseptic nature of a sterile paper record. Therefore, appellate review must occur with full awareness of, and respect for, the trier's superior 'feel' for the case.")

In sum, when a district judge's analysis is rationally based on the Section 3553 factors, a sentence other than that recommended by the Guidelines is not unreasonable simply because it is based on a different weighing of those factors. *See Rita*, slip op. at 10 ("different judges (and others) can differ as to how best to reconcile the disparate ends of punishment"). And because judges operating under an advisory Guidelines system may properly conclude that non-extraordinary circumstances pertinent to one or more Section 3553(a) factors warrant a sentence that is materially different from that recommended under Section 3553(a)(4), such a conclusion is not a proper ground for reversal.

CONCLUSION

The judgments of the courts of appeals should be reversed and the cases remanded for proceedings consistent with this Court's rulings in *United States v. Booker* and *Rita v. United States*.

Respectfully submitted.

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